IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5006

LAWRENCE McCALL,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 6, 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 N.C. 512, 223 S.E. 2d 303 (1976) and is set out in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on April 6, 1976 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the argument of the District Attorney for the State to the jury denied the petitioner due process of law and effective assistance of counsel in violation of the Sixth or Fourteenth Amendments to the Constitution of the United States?

2. Whether the trial court's instruction to the jury that two presumptions were raised against the defendant upon proof by the State of an intentional killing with a deadly weapon diminished the State's burden of proving each element of the crime with which the petitioner was charged beyond a reasonable doubt in violation of the Fifth or Fourteenth Amendments to the Constitution of the United States?

3. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina.

§14-17. (Vol. 1B, 1975 Cum. Supp., p. 198)

"Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

§15-176.3. (Vol. 1C, p. 78)

"Informing and questioning potential jurors on consequences of guilty verdict.--When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the Court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

§15-176.4. (Vol. 1C, p. 79)

"Instruction to jury on consequences of guilty verdict.--When a defendant is indicted for a crime for which the penalty is a sentence of death, the Court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§15-176.5. (Vol. 1C, p. 79)

"Argument to jury on consequences of guilty verdict.--When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§15-187. (Vol. 1C, p. 89)

"Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188. (Vol. 1C, p. 89)

"Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only

be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

AMENDMENT V.
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.
UNITED STATES CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENTMENT VIII.
UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV., SECTION 1.
UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 6, 1976, affirming Petitioner's conviction and death sentence. The Petitioner, Lawrence McCall, was tried on two charges of murder in the first degree for the alleged killing of Mrs. Ruth Looker Hice and Billy Derwood Hice. The Petitioner was convicted of murder in the first degree for the alleged killing of Mrs. Ruth Looker Hice and was sentenced to die on June 7, 1975, in the Transylvania County Superior Court of North Carolina.[1]

[1]Petitioner's sentence of death was imposed under North Carolina General Statute Section 14-17.

In the case charging the murder of Billy Derwood Hice, the jury was unable to agree on a verdict and a juror was withdrawn and a mistrial was declared as to that case.

The Petitioner had previously been convicted in both cases at the first February, 1974 Regular Criminal Session of the Transylvania County Superior Court of North Carolina. Those convictions were reversed by the Supreme Court of North Carolina in a decision reported at 286 N.C. 472, 212 S.E. 2d 132 (1975) and is set out in Appendix B hereto.

The evidence for the State showed the following: On 12 September 1973 the decedents, Billy Derwood Hice and Ruth Looker Hice, lived in a home on the West side of the North fork of the French Broad River in the Transylvania County, North Carolina community of Balsam Grove. (R p 10). Lloyd McCall lived in a house and his son, Gary McCall and son-in-law, Keith Hensley, lived in house trailers on the West side of the river near the home of Mr. and Mrs. Hice. State Highway #215 is on the East side of and runs parallel to the river and the only method of ingress to and egress from the Hice's and McCall's property was by way of a concrete bridge built by Mr. Hice which crossed the river and intersected with Highway #215. Mr. and Mrs. Melvin Owens lived on the East side of the river and Highway #215 and directly across from Gary McCall's trailer. (R pp 10 and 11). Petitioner, Lawrence McCall, and Lloyd McCall are brothers. (R p 11).

Mr. and Mrs. Melvin Owens were the chief witnesses for the State. Mr. Owens testified as follows: He first saw the Petitioner on the day of the shooting at approximately 7:30 or 8:00 a.m. when the Petitioner left the house of his brother, Lloyd, and drove with Lloyd down Highway #215. Petitioner was next seen at approximately 12:00 p.m., when he and Lloyd returned to Lloyd's house. About 2:30 p.m., Petitioner drove his Mustang down to Gary McCall's trailer near the river. From their front porch the Owens observed Lawrence McCall come out from behind Gary's trailer with a shotgun in his hand which he fired into the air. The force of the discharge "backed him up between two and three steps". (R p 11).

At this time Mr. Hice was attempting to install a swinging gate at the end of the concrete bridge on the West side of the river. Shortly after Petitioner fired the shotgun, Mr. Hice returned to his trailer for some additional materials for the gate. Lawrence McCall then left Gary McCall's trailer and drove down Highway #215. (R p 12). A short time later, both Mr. and Mrs. Hice again began to work on the gate. While they were working on the gate, Petitioner drove up

and down the highway past the bridge six or eight times, the last time driving out onto the bridge and watching the Hice's work. Petitioner then backed off the bridge and went down the highway. (R p 12).

Mr. Owens started to walk over to the bridge to speak with the Hice's at approximately 5:00 p.m. when he saw Lawrence McCall in his automobile reappear down the highway, driving at a high rate of speed. (R p 13). Mr. Owens testified that Lawrence McCall swerved the automobile at him as he went past and drove onto the bridge. The Hice's threw up their hands in an effort to stop Lawrence McCall but the Petitioner's car "butted them backwards", knocking Mrs. Hice down. (R pp 13, 14). Petitioner then parked at Gary McCall's trailer and went in the front door. Mr. Owens joined the Hice's at the gate. (R p 14). Mr. Owens testified that Lloyd and Gary McCall were approximately 550 to 600 feet from Gary McCall's trailer at that time. (R p 17). Soon after Lawrence McCall stopped in front of Gary McCall's trailer a shot was fired, wounding Mr. Hice and Mr. Owens and killing Mrs. Hice. (R p 14). Mr. Owens suffered a head injury but was able to make it back across the road to his house and on the way across the bridge heard a second shot which he stated came from Gary McCall's trailer. (R p 15). The second shot struck and killed Mr. Hice as he bent over his wife. (R p 16).

Mr. Owens crossed the road and received first aid from his wife and was able to get in his pickup truck and go to his brother-in-law's house for help. (R p 16). After Mr. Owens left, Mrs. Owens remained in her house and watched the area around the bridge. She testified that she observed Lawrence McCall leave from the area of Gary McCall's trailer right after her husband had left and drive without stopping past the two bodies, across the bridge and into the road. (R p 40).

On cross-examination of Mr. and Mrs. Owens, the defense was able to establish that Lloyd and Gary McCall were on bad terms with Mr. and Mrs. Hice concerning a boundary dispute and that there was no dispute or argument between Lawrence McCall and the Hice's. (R pp 31, 32). It was also brought out on cross-examination that Mr. Owens had a great deal of animosity for Lawrence McCall who was his former son-in-law. (R p 32). Lloyd McCall is the son-in-law of Mr. and Mrs. Owens and Gary McCall is Lloyd's son and their grandson.

After police officers arrived at the scene, and during a search of the area, some "shotgun wadding" was found approximately 24 feet from Gary McCall's trailer and in a straight line between the trailer and the bodies. Another small

piece of wadding was found on the inside windowsill of the trailer. (R p 61). A hole was observed in the top screen of the window in the north end of Gary McCall's trailer and a piece of the screen on the top left hand side of the window had been torn down. (R p 61). Officers obtained a search warrant for Gary McCall's trailer and found a "black sooty ring" around the hole in the screen, three .12 gauge shotgun shells from a dresser drawer, a rifle and a .20 gauge shotgun. (R pp 61, 62).

Officers arrested Lawrence McCall at approximately 2:30 a.m. on September 13, 1973 in his home. (R p 64). Officers then conducted a search of the house in which the Petitioner was staying and found a .12 gauge shotgun between the quilts and the mattress of a bed in the house. The shotgun smelled of fresh powder. (R p 65). After being taken into custody, the Petitioner was found to have a large bruise on the bicep of his left arm. (R pp 68, 69). A State Bureau of Investigation firearms expert testified that one of the pieces of shotgun wadding found in a direct line between Gary McCall's trailer and the bodies was from a .12 gauge shell. (R p 74).

Defendant offered evidence which showed the following: Mr. Charles Chambers, a special agent with the North Carolina State Bureau of Investigation who investigated the case for the State, testified that he interviewed Mr. Melvin Owens on two occasions, the first time on September 12, 1973 at the hospital the night of the shooting and again the next morning, September 13, 1973 at the hospital. Mr. Chambers also interviewed Mrs. Melvin Owens on September 13, 1973 at the hospital. (R pp 87, 88). Mr. Chambers stated that he prepared the results of these interviews into a written report, the substance of which was: that Lloyd McCall and Mr. Hice had been having a dispute concerning the bridge over the French Broad River for approximately two years. That Lloyd McCall actually claimed that he owned the bridge (R p 89). That a few minutes prior to the shooting Lloyd McCall came up the road with his truck and made an attempt to side swipe him. (R p 90). That Lawrence McCall came in "right behind Lloyd, in his Mustang automobile and that both Lloyd McCall and Lawrence McCall went between the trailers." (R p 91). That Melvin Owens stated that "the shots were fired from between the two trailers and he thinks only three people were at the trailer. They were Lloyd McCall, Gary McCall and Lawrence McCall." (R p 92). That Mr. Owens "stated that Lloyd or Lawrence was the one that did the shooting". (R p 93).

Mr. Chambers testified that at his interview with Mrs. Melvin Owens she told him that prior to the shooting Lloyd McCall crossed the bridge first and

that Lawrence McCall came behind him (R p 95). And that "just before the shot was fired that she saw Lloyd McCall come out from between the trailers in his truck, Gary McCall following, running, and Gary did not have anything in his hands. Just as the truck and Gary went around the end of the trailer and out of sight, it must not have been over a minute before the gun fired and the three were shot. That she does not know what happened to the truck or Gary McCall after the shots were fired". (R p 95). She further stated to Agent Chambers, "after the shooting and after her husband had come to the house the pickup pulled out in there and came around the pond and drove up onto Lloyd McCall's yard. It was after her husband had left for Carter McCall's that Lloyd and Gary pulled out from between the trailers and went to Lloyd's house." (R p 96).

The Petitioner then introduced the testimony of Debbie Williams, Gail Enloe, Mike McCall and Phillip Owens, all of whom testified that they had arrived at the scene of the shooting, soon after it occurred and all testified that they had heard Mrs. Owens state that Lloyd McCall did the shooting.[2]

The State offered rebuttal witnesses to establish that Gary McCall and Lloyd McCall were not at the scene of the shooting when it occurred. Carol McCall testified, "In a little bit after I heard the gun fired, Gary came running behind the house and a'beating on the back door. . . .It was a few minutes after the gun fired before Gary knocked on the back door." (R p 113). She also testified that Gary McCall returned to his trailer after the shooting and that, "when they came back Gary had a shell -- a shotgun shell, I guess. . . .Gary threw the shell up in the attic at his daddy's house." (R p 113). She further testified that "at the time Gary came to the house Lloyd and Keith were not there. . . . In a little while after Lloyd come home he went out to his truck and got his gun out of his truck and brought it in the house." (R p 115).

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[2]Debbie Williams testified that she heard Mrs. Owens state "Lloyd did it. Lloyd killed the Hice's. Gary was running behind him down through the field, trying to stop him. Lloyd did it." (R p 101, 102).

Gail Enloe testified that she heard Mrs. Owens state that Lloyd did it and that Mrs. Owens said, "Gary was running down across the field behind him, trying to stop him." and that she then heard her state, "Lloyd did it. Lloyd killed them." (R p 105).

Mike McCall testified that he heard Mrs. Owens state in response to a question from someone as to who did the shooting -- she stated, "Well, Lloyd McCall killed them. He was standing over there at the end of the trailer and Gary was trying to take the gun away from him." (R p 108, 109).

Phillip Owens testified that in response to a question from someone as to who killed the Hice's, Mrs. Owens stated, "Lord, Lloyd McCall killed them . . . he was standing right at the end of that trailer over there with his shotgun and Gary trying to take it away from him." (R p 110).

Deputy Sheriff Hubert Brown testified that he had gotten a .22 rifle and a .20 gauge shotgun from the Gary McCall residence. (R p 116). Keith Boley testified that when he arrived at Lloyd McCall's house, Lloyd McCall and Gary McCall were there and that he took Gary McCall down to his trailer and Gary McCall went in the trailer and remained there approximately 20 or 30 seconds and came out smoking a cigarette. (R p 118). Trooper R. Boyd Sutton testified that he had been at the scene of the crime the entire night of September 12 and that he had not heard Mrs. Melvin Owens make any statements as to what she had seen. The State then rested. (R p 120).

In his argument to the jury the district attorney made numerous references to the fact that Petitioner's counsel was an outsider. The pertinent parts of the argument of the district attorney are set out hereto in Appendix C. (R pp 121-124).

At the conclusion of the testimony and the arguments of counsel for the defendant and the State, the Court instructed the jury that it could return a verdict of not guilty, guilty of second degree murder or guilty of first degree murder. (R pp 144-145).

In its charge to the jury, the Court charged that two presumptions were raised against the defendant upon proof by the State of an intentional killing with a deadly weapon. First, that it was unlawful, and second, that it was done with malice. The pertinent portions of the charge to the jury are set out hereto in Appendix D. (R pp 124-145).

The jury found Petitioner guilty of first degree murder as to the shooting of Mrs. Ruth Looker Hice and the Court thereupon sentenced Petitioner to die. The jury was unable to agree upon a verdict in the shooting of Billy Derwood Hice and a mistrial was declared in that case.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's grouping of exceptions and assignments of error (R p 148, 154) in the record on appeal assigned the argument of the district attorney to the jury in this case as error because:

> "The argument tended to belittle, demean, and ridicule appellant's counsel for the apparent purpose of diminishing counsel's effectiveness. This action deprived appellant of a fair trial and denied appellant due process of law and effective assistance of counsel contrary to law and to the Constitutions of the State of North Carolina and the United States."
>
> Assignment of Error No. 2, R p 148.

The Supreme Court of North Carolina rejected this contention on the merits, citing its prior decisions in State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975); State v. Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); State v. Thompson, 278 N.C. 277, 179 S.E. 2d 315 (1971); State v. Graves, 252 N.C. 779, 114 S.E. 2d 770 (1960); State v. Williams, 276 N.C. 703, 174 S.E. 2d 503 (1970); State v. Miller, 271 N.C. 646, 157 S.E. 2d 335 (1967); State v. Stegmann, 286 N.C. 638, 213 S.E. 2d 262 (1975) and State v. Seipel, 252 N.C. 335, 113 S.E. 2d 432 (1960). 223 S.E. 2d at 309 (Appendix A at page 6a,7a).

Petitioners grouping of exceptions and assignments of error (R p 148, 154) in the record on appeal assigned the Court's charge to the jury in this case as error because:

> "It is respectfully submitted that the Court erred in its charge by charging the jury that two presumptions were raised against the defendant upon proof by the State of an intentional killing with a deadly weapon in that that portion of the charge diminished the State's burden of proving each element of the crime beyond a reasonable doubt."

Assignment of Error No. 3, R p 152.

The Supreme Court of North Carolina rejected this contention, citing its prior decision of State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (1975) which held that the recent case of Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S. Ct. 1881 (1975) was not to be applied retroactively. Further the Supreme Court of North Carolina rejected Petitioner's contention on the merits, citing its prior case of State v. Williams, 288 N.C. 680, 220 S.E. 2d 558 (1975). 223 S.E. 2d at 309-310. (Appendix A at pages 7a,8a).

Petitioner's grouping of exceptions and assignments of error (R pp 148-154) in the record on appeal assigned the death sentence in this case as error because:

> "The appellant assigns as error the judgment of the Court sentencing the defendant to death on the grounds that the penalty of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States."

Assignment of Error No. 4, R p 154.

The Supreme Court of North Carolina rejected this contention on the merits, stating: "Questions raised by this assignment of error have been considered and found to be without merit" . . . citing numerous authorities which may be found in the opinion of the Court attached hereto as Exhibit A at page 8a .

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ARGUMENT OF THE DISTRICT ATTORNEY FOR THE STATE DENIED THE PETITIONER DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The District Attorney for the State in his argument to the jury made numerous comments concerning the fact that Petitioner's counsel was from the "Big City of Raleigh" and made insinuations and allegations as to the vast differences between citizens of Transylvania County, North Carolina and citizens of Raleigh, North Carolina and that counsel's argument was not credible for that reason. There are in fact vast differences between Transylvania County, which is located in the western mountainous area of the state with a population of approximately 18,571, and Raleigh, the State Capitol, which is in metropolitan Wake County with a population of approximately 228,453 and is located in the East central part of the state. These geographical and social differences certainly would bear no relation to the credibility of Petitioner's counsel and are inappropriate and prejudicial matters when used before a jury.

The District Attorney was attempting to foster a sense of unity and regionalism in the jury in order to negate any effectiveness petitioner's out-of-town counsel might have. The outsider argument was clearly used to create antagonism towards petitioner's counsel to reduce his credibility with the jury and thus promote the District Attorney's chances for a guilty verdict. The vehemence and persistence of the District Attorney's argument was not justified and is totally inappropriate when someone is on trial for his life.

This Court in Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) set guidelines for the duties and demeanor of prosecuting officials. Petitioner respectfully contends that the argument of the District Attorney so prejudiced him he did not receive a fair trial under the Berger guidelines. Certainly, the District Attorney's argument would

have been inappropriate had it been directed at the petitioner personally and it is equally inappropriate when aimed at petitioner's counsel who is his spokesman and alter ego throughout the trial.

The location of Lloyd and Gary McCall at the time of the shooting was highly critical in the case. During the investigation of the case Mr. and Mrs. Owens both made statements to the State's investigators on this point that were totally inconsistent with their testimony at trial. Thus, the likelihood of substantial prejudice to the Petitioner from the District Attorney's arguments seems highly probable. It is respectfully submitted that this Court should speak to condemn a common practice that has absolutely no place in the administration of justice. A review of the denial of due process and effective assistance of counsel to the petitioner as a result of the district attorney's argument is warranted in this case.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT'S INSTRUCTION TO THE JURY THAT TWO PRESUMPTIONS WERE RAISED AGAINST THE DEFENDANT UPON PROOF BY THE STATE OF AN INTENTIONAL KILLING WITH A DEADLY WEAPON DIMINISHED THE STATE'S BURDEN OF PROVING EACH ELEMENT OF THE CRIME WITH WHICH THE PETITIONER WAS CHARGED BEYOND A REASONABLE DOUBT IN VIOLATION OF THE FIFTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The question of whether this Court's decision in Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), should be applied retroactively was answered in the negative by the North Carolina Supreme Court in the petitioner's case citing their prior holding in State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (1975). The North Carolina Court stated that it would apply the Mullaney principles only from the date of the Mullaney decision, June 9, 1975, and therefore, Mullaney was not applicable to petitioner's case since petitioner was sentenced on June 7, 1975. The question of the retroactivity of Mullaney has been decided by other courts with differing results.[3]

The Courts are clearly in a state of confusion over the application of the important constitutional principles provided for in Mullaney. Since Mullaney relied heavily on this Court's decision in In Re Winship, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S. Ct. 1068 (1970), which was held to be completely retroactive in Ivan v. City of New York, 407 U.S. 203, 32 L.Ed. 2d 659, 92 S. Ct. 1951 (1972), the petitioner contends that the principles established by Mullaney should be held to be fully retroactive for the reasons stated in Ivan, supra. Apparently, this Court felt that Mullaney's constitutional rights under the due process clause had been violated at the time of his trial in 1966, the apparent conclusion being that this Court felt he had the constitutional right in 1966 to have the prosecution bear the burden of proving the absence of heat of passion on sudden provocation beyond a reasonable doubt. If Mullaney had this right in 1966, then surely the petitioner in this case enjoyed the same right on June 7, 1975, two days before the decision was handed down. Because the Court below has decided a federal question of substance

[3] In Fuentes v. State, 18 CRL 2153 (Delaware Supreme Court, decided 10-14-75), the Court held Mullaney to be prospective only from the date of its decision in Fuentes. Evans v. State, 39A 2d.300 (Md. Ct. of Spec. Apps., 1975), held Mullaney to be retroactive. People v. Patterson, 19 CRL 2050 (N.Y.Ct. of Apps., decided 4-21-76), held Mullaney retroactive. In Castro v. Regan, 18 CRL 2245 (CA 3d, decided 11-24-75), the Court did not reach the retroactivity question but in dictum stated that it was arguable that Mullaney should be given retroactive effect.

in a way probably not in accord with applicable decisions of this Court and the importance of the Mullaney decision in the administration of criminal justice, this Court should review the lower Court's holding that Mullaney is not to be applied retroactively.

It is the law of the State of North Carolina that before a conviction of murder in the first degree can be sustained the State must show an unlawful and intentional killing with premeditation and deliberation and with malice. (See Appendix A at page 5a). The trial judge in the petitioner's case instructed the jury that upon proof that a person intentionally, with the use of a deadly weapon, kills another, it was presumed to be done with malice and that it was unlawful. While we do not have in the instant case a specific charge that in order to reduce the crime of murder to manslaughter, the defendant must prove he acted in the heat of passion, as was true in Mullaney, the language of the charge certainly imposes a definite and unequivocable burden upon the defendant to negate malice. While not specifically so holding, the language of Mullaney would certainly indicate that the State would be required to prove malice from all the factual circumstances surrounding the commission of the homicide without the benefit of the presumption of malice arising from the use of a deadly weapon. This Court should review petitioner's case to determine if states may constitutionally continue to use a presumption of malice under this Court's decisions in Mullaney v. Wilbur, supra, and in In Re Winship, supra.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The petitioner was sentenced to death under North Carolina General Statute Section 14-17 which was reenacted after the North Carolina Supreme Court decision in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), which invalidated the North Carolina death penalty procedure prior to that time. The statute, which became effective April 8, 1974, does not in any way alter North Carolina's capital procedure so as to limit or control the arbitrary and capricious infliction of that State's nominally mandatory death penalty. The petitioner is aware that this Court is now considering the constitutionality of the death penalty and therefore will not burden the Court with lengthy and repetitious argument. However, petitioner asserts that the North Carolina death penalty is unconstitutional

in that: (1) It is arbitrarily applied due to prosecutorial charging discretion, plea bargaining, jury discretion, and executive clemency, and (2) the death penalty is excessively cruel.

The North Carolina Legislature has followed the lead of the North Carolina Supreme Court in preserving procedures that allow a jury to nullify the "mandatory" death penalty in cases which appeal to their sympathy. Codifying the rule of State v. Britt, 285 N.C. 256, 204 S.E. 2d 817 (1974), the legislature has provided that defense counsel may inform the jury panel on voir dire that a death penalty will be imposed upon the return of a verdict of guilty to a capital crime (North Carolina General Statute, Section 15-176.3), that the trial judge may be requested to instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty to a capital crime (North Carolina General Statute Section 15-176.4), and that in closing argument in a capital case counsel may "indicate the consequences of a verdict of guilty," (North Carolina General Statute, Section 15-176.5). The result of these provisions is to invoke de facto jury discretion which undercuts the imposition of North Carolina's supposedly mandatory death penalty in a random and arbitrary method.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

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